

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

1 UNITED STATES OF AMERICA) Greensboro, North Carolina
2) July 17, 2015
3 vs.) 11:30 a.m.
4)
5 JUAN MORENO-TAPIA,)
6 Defendant.) Case No. 1:14CR241-1
7)

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE CATHERINE C. EAGLES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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24 Proceedings reported by stenotype reporter.
25 Transcript produced by Computer-Aided Transcription.

P R O C E E D I N G S

(At 11:30 a.m., proceedings commenced.)

(Defendant present.)

MR. RAMASWAMY: Your Honor, the Government would call United States versus Juan Moreno-Tapia in 1:14CR241-1, represented by Mr. Duberstein, on a motion hearing. We've been having the interpreter sworn as a precaution, as needed.

THE COURT: All right. The courtroom deputy will swear the interpreter.

(Interpreter sworn by the clerk.)

THE COURT: Mr. Moreno-Tapia, I believe we've been proceeding in English, and the interpreter has been present in case you need her. Is that how you want to proceed today?

THE DEFENDANT: Yes, ma'am.

THE COURT: Because she is here, if you want her to interpret every single thing that is said, she will gladly do that. All you have to do is say so now. Or at any time during the proceedings, raise your hand, and I'll stop, and we'll switch over to that. Is that agreeable to you?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. You can be seated. Can I have a minute to confer with the court reporter.

(Bench conference with court reporter.)

THE COURT: All right. So as I recall, we have talked several times about what should happen in this case as a

1 result of the state court vacating his convictions for --
2 primarily, we're talking indecent liberties, but I know we had
3 the other assault charge, too -- and there's a motion to vacate
4 the deportation order under 8, United States Code,
5 Section 1326(d), there's a conditional order to withdraw his
6 guilty plea, and there's a motion to dismiss the indictment. I
7 believe you all have filed a bunch of briefs, and we've had
8 argument, and I took it under advisement, right?

9 MR. DUBERSTEIN: That's my understanding, Your Honor.

10 THE COURT: Okay. I did not promise you all more
11 argument time, I don't believe. So let me -- I have kind of a
12 long order to enter because I don't have time to turn it into a
13 written order which takes, you know -- takes me a couple weeks.
14 So I'm just going to basically read it. But the upshot is, so
15 we can start out and we all know, I'm going to deny all three
16 of these motions. After I go over my reasons for that, then we
17 can talk about what to do next.

18 So as I understand it, the facts are not in dispute.
19 I'll recite them, and you all can correct me should I be wrong
20 about any of these details.

21 In 2007, Mr. Moreno-Tapia pled guilty in state court
22 to felony serious injury by vehicle and three counts of felony
23 indecent liberties. Before pleading guilty, he was not advised
24 by his attorney or by the Court that he would likely be
25 deported as a result of the convictions.

1 After he served an active prison term, the
2 immigration authorities initiated deportation proceedings based
3 on the indecent liberties conviction. Mr. Moreno-Tapia stated
4 that he did not wish to contest removal or request withholding
5 of removal and signed a form to that effect. He did not appeal
6 the deportation order, and he was deported.

7 Upon his deportation, he was advised that it would be
8 illegal for him to return without permission. After
9 deportation, he took no action to seek reconsideration of the
10 deportation order or to reopen the deportation proceedings, nor
11 did he seek to vacate the state convictions.

12 At some point he returned to the United States
13 without permission from Homeland Security. He was eventually
14 arrested -- I think it was a burglary charge, some sort of
15 larceny or burglary charge by state officials, and he
16 assumed -- that's not really important. He was arrested by
17 state officials on some charge, and he soon thereafter was
18 charged in this court for failure to register as a sex offender
19 and illegal reentry of a removed alien.

20 After he pled guilty to illegal reentry pursuant to a
21 plea agreement, he moved in state court to vacate his 2007
22 state court convictions. The state court granted the motion
23 finding Mr. Moreno-Tapia's guilty plea was not entered
24 knowingly and voluntarily because of the absence of information
25 concerning the immigration consequences. The state court cited

1 *Padilla versus Kentucky*, though it did not find ineffective
2 assistance of counsel, which was the issue in *Padilla*, but it
3 did find that Mr. Moreno-Tapia's due process rights were
4 violated.

5 Did I misstate any of the facts from the Government's
6 perspective?

7 MR. RAMASWAMY: No, Your Honor.

8 THE COURT: From -- Mr. Duberstein, from your
9 perspective?

10 MR. DUBERSTEIN: No, Your Honor. I would add to that
11 that Mr. Moreno-Tapia had not actually seen the plea document
12 in question until I showed it to him during this case.

13 THE COURT: I believe that's the evidence, and I'll
14 accept that as a supplement to the findings of fact that I just
15 found.

16 MR. DUBERSTEIN: Thank you, Judge.

17 THE COURT: But he certainly was present when he pled
18 guilty. I mean, I don't think these happened in his absence,
19 or he was physically present for -- yeah, but I certainly agree
20 that's the evidence as you just stated, and I'll amend it to
21 that.

22 Now, Mr. Moreno-Tapia contends he is entitled to
23 relief because the deportation order at issue was invalid and
24 issued in violation of his due process rights and generally in
25 reliance on the *Mendoza-Lopez* case from the Supreme Court in

1 1987. I'm not going to give you all the full cites to these
2 cases because we've all talked about them, and they're in the
3 record. If that's not true, I may provide the cite.

4 So, first, I believe he contends that he meets the
5 standards established in the illegal reentry statute concerning
6 collateral attacks; and in the alternative, he contends that he
7 should not be required to have exhausted his administrative
8 remedies because his consent to deportation was not knowing and
9 voluntary. Is that right?

10 MR. DUBERSTEIN: Yes, Your Honor.

11 THE COURT: Okay. And in the alternative, he
12 contends that regardless of whether he met the statutory
13 requirements for a collateral attack, his due process rights
14 would be violated by allowing the Government to prosecute him
15 for illegal reentry when the underlying conviction -- when the
16 conviction underlying the deportation was vacated for
17 constitutional infirmity. Did I accurately state your
18 arguments, Mr. Duberstein --

19 MR. DUBERSTEIN: Yes, Your Honor, I'm just --

20 THE COURT: -- in summary form?

21 MR. DUBERSTEIN: I'm just referring to my original
22 document just to make sure that -- and the Court at that point,
23 you're just referring to the requirement of exhaustion, the
24 first one.

25 THE COURT: Yeah, exhaustion and --

1 MR. DUBERSTEIN: Yeah.

2 THE COURT: -- the second one.

3 Now, let me start with the Section 1326 issue. So
4 after the *Mendoza-Lopez* decision, Congress modified the illegal
5 reentry statute to allow collateral attack on deportation
6 orders if three circumstances are met: Mr. Moreno-Tapia has to
7 show that he exhausted his administrative remedies, that the
8 deportation proceedings improperly deprived him of the
9 opportunity for judicial review, and that the entry of the
10 deportation order was fundamentally unfair.

11 So looking at those first two requirements,
12 Mr. Moreno-Tapia does not contend he was affirmatively
13 misadvised by anyone involved in the deportation proceedings
14 concerning his right to contest the deportation or to appeal
15 the decision. He admits he signed the consent to deportation
16 form. He never sought any sort of review of any part of the
17 deportation proceedings, nor has he sought to reopen the
18 deportation proceedings for reconsideration in light of the
19 vacated state conviction. He has not identified anything that
20 immigration authorities should have done during the course of
21 the deportation proceedings that they did not do, and the Court
22 thus finds that he's not met the first two requirements of the
23 statute as those requirements would ordinarily be interpreted.

24 It's also not clear -- I'm relying on that, but I
25 just would note that it is also not clear that he can show

1 fundamental unfairness of which prejudice is a part.

2 Mr. Moreno-Tapia says he was deported, and that was the
3 prejudice. But the test is not whether he would have been
4 deported if he had not pled guilty, but whether he would have
5 been deported if his conviction had been vacated.

6 You know, I kind of wandered around the immigration
7 statutes. If you read these cases, these 1326(d) cases, a lot
8 of them -- most of them have a pretty -- a pretty overwhelming
9 discussion of immigration law and this prejudice point. You
10 all have not briefed that for me, and I will just say I haven't
11 really tried to figure that out. I kind of wandered around in
12 the immigration statutes. I looked at *Williams versus*
13 *Gonzales*, 499 F.3d 329, a Fourth Circuit case, which talked
14 about an alien's right to reopen; but then in its subsequent
15 history, it's pretty clear the Court really can't review the
16 agency's decision on such a motion to reopen.

17 There was a case, an unreported case in 2005, *Parikh*,
18 155 Fed Appx 635, which seems to indicate Mr. Moreno-Tapia
19 would have been deported anyway even if the conviction was
20 vacated. But then there was a later case called *Dung Phan*,
21 667 F.3d 448, which seemed to indicate that maybe that wasn't
22 true. So the upshot of that is I really have no idea about the
23 prejudice. I'm not asking you to argue about it. I'm just
24 saying it's not really been briefed. I think as the defendant
25 presented it, the question was the deportation itself was the

1 prejudice, but I don't really think that's the test, and, you
2 know, if this ever comes back, it would be my view we would
3 have to explore that further, at least on the cases as I've
4 read them so far. I would certainly hope that wouldn't be
5 true, but it looks like it's true.

6 Further, I would note that Mr. Moreno-Tapia has not
7 contended he is innocent of the indecent liberties charge, and
8 he has offered no evidence of innocence. Indeed, there is
9 substantial evidence of his guilt. You know, even beyond his
10 guilty plea, the recent affidavit from the victim just says she
11 didn't think there was anything wrong with what he did, but she
12 basically admits that the sexual conduct with the 15-year-old
13 occurred. So, it seems to me, it's very unlikely the third
14 factor has been met, at least on the record that I have right
15 now. So that means that Mr. Moreno-Tapia has not shown the
16 statutory grounds necessary for a collateral attack on his
17 deportation.

18 Now, next, he contends that the deportation was not
19 knowing and voluntary. I believe the burden actually is on the
20 Government to prove that it was. So this is a little bit
21 different, and he relies on a number of cases such as *Sosa* out
22 of the Second Circuit case, I think we talked about the *Ortiz*
23 case out of the Fourth Circuit, and the *Cerna* case, also a
24 Second Circuit case, which indicate a waiver of a right to
25 appeal a deportation order which is not knowing and voluntary

1 and is invalid so that the exhaustion requirement is excused.

2 So these cases concern rights one has with the
3 immigration proceeding. None of them concern a lack of
4 knowledge about the reasons a deportable conviction might be
5 subject to collateral attack. So it just does not seem to me
6 that due process requires that immigration officials evaluate
7 and advise someone facing deportation based on a deportable
8 criminal conviction of all the possible reasons the conviction
9 might be invalid or subject to being set aside or vacated.

10 And I don't think due process requires immigration
11 officials to advise someone facing deportation based on such a
12 criminal conviction that the person, you know, might want to
13 think about challenging the validity of the conviction or ought
14 to try challenge it in these proceedings.

15 I would also note that really the due process issue
16 is Mr. Moreno-Tapia's due process rights were protected in
17 state court. He had substantial due process protections at the
18 state court level to seek a remedy for the unconstitutional
19 conviction, which, of course, ultimately he took advantage of.
20 You know, it's sort of interesting *Padilla* -- this is a side
21 note -- *Padilla* has been held not to be retroactive. But, of
22 course, the state court ruled on knowing and voluntary grounds
23 which was -- and, of course, they can grant it even though it
24 isn't retroactive, I suppose. There's still a violation.
25 That's really a side point that's not important.

1 But it seems to me his due process rights in
2 connection with obtaining review of the underlying conviction
3 were fully protected and that he did knowingly and voluntarily
4 consent to the deportation. There's nothing to indicate any
5 misinformation that was given to him, and it doesn't seem to me
6 that the problem in his state court conviction bleeds over into
7 the immigration proceeding.

8 So, finally, the use of his vacated conviction, the
9 use of the deportation, which was based on his vacated
10 conviction, to prosecute him for illegal reentry. So, first,
11 as I think I just indicated by the way I just said that, the
12 new prosecution for illegal reentry is not based on the old
13 vacated conviction, it is based on the deportation; and the
14 deportation was based on a facially valid conviction at the
15 time of the deportation which was a deportable offense. As I
16 just mentioned, there were no problems with the deportation
17 procedure, and it was valid when it was entered.

18 I would also say courts have consistently held in a
19 number of different contexts that the relevant question is
20 whether the underlying conviction was in place at the time of
21 the new conduct. I kind of got into this reading the *Robertson*
22 case which was on the SORNA issue on the motion to dismiss, but
23 in *Lewis versus United States*, 445 US 55, a defendant charged
24 with possession of a firearm by felon contended that an
25 underlying felony conviction was unconstitutionally obtained,

1 and the Court held this was of no moment as it "...did not
2 alter the fact that the defendant had been convicted of a
3 felony at the time he possessed the firearm." The *Lewis* court
4 also said that "...it [was] important...that a convicted felon
5 may challenge the validity of a prior conviction [and]
6 otherwise remove his disability before obtaining a firearm."
7 And as I mentioned previously, that is true here because
8 Mr. Moreno-Tapia could have challenged the validity of the
9 prior conviction before returning to the United States.

10 The Fourth Circuit subsequently applied *Lewis* in a
11 situation where the underlying conviction had actually been set
12 aside after the firearm was possessed but before trial, and
13 that was the *Kahoe* case, 134 F.3d 1230. Both the *Lewis* courts
14 and the *Kahoe* case specifically overruled due process
15 arguments. Now, Congress has since amended that statute, so I
16 believe vacated convictions aren't used anymore, but that
17 really doesn't undermine the due process analysis, and *Lewis*
18 continues to be applied in other contexts.

19 The *DuBose* case out of the Eleventh Circuit, 598 F.3d
20 726, applied it in a firearms case involving someone who was
21 subject to a domestic violence protective order, and they said
22 the validity of the underlying protective order was irrelevant.
23 That was also the decision out of the *McIlwain* case out of the
24 Eleventh Circuit, 772 F.3d 688, which involved a challenge to
25 the constitutional validity of a commitment to mental

1 institution in a firearms case. And then, of course, you have
2 the *Robertson* case in the First Circuit in a SORNA prosecution.

3 So it seems to me that the due process argument has
4 been rejected. And *Robertson*, of course, talks about the *Lewis*
5 case in detail. *Mendoza-Lopez* doesn't help, it seemed to me,
6 because in that case there were no avenues for judicial review
7 of the decision at issue. Here, the state court MAR statute
8 provides a well-established mechanism for judicial review of an
9 allegedly unconstitutional statute, and the *Mendoza-Lopez* court
10 specifically noted when it was talking about the *Lewis* case
11 that in *Lewis* the defendant had an opportunity to challenge the
12 predicate conviction in a judicial forum before he possessed
13 the firearm, and we have that same thing here.

14 So the illegal reentry statute focuses on whether the
15 defendant was deported, which is undisputed. His deportation
16 was dependent on whether he had been convicted of a deportable
17 offense, which is also undisputed, because at the time of his
18 deportation he had been convicted. That deportation was lawful
19 at the time it occurred, and at the time Mr. Moreno-Tapia
20 reentered the country his convictions were in place and
21 facially valid. So it is not a due process violation for an
22 illegal reentry conviction to be based on a valid deportation
23 order resulting from a valid -- facially valid conviction, even
24 if after the reentry the underlying conviction is vacated on
25 constitutional grounds.

1 So in will say I had a lot of confusion, and I still
2 have some confusion about the 16-level enhancement and the
3 Government's concession on that because it sounded like the
4 Government was conceding it would violate Mr. Moreno-Tapia's
5 due process rights to add the 16-level enhancement at
6 sentencing for being deported after conviction of an aggravated
7 felony where that conviction has since been vacated. But they
8 are not making the same due process concession about, for
9 example, the SORNA count in the indictment when we got to the
10 motion to dismiss the indictment. They were making kind of the
11 opposite argument there. And the reliance on *Padilla* just
12 didn't seem to me to really speak to the 16-level enhancement.
13 It concerned the defendant's Sixth Amendment right to counsel.
14 It's not retroactive. It really has nothing to do with due
15 process rights. So I'm just not sure there is a due process --
16 well, I don't think there is, and I will find there is not a
17 due process problem in giving him the 16-level enhancement.

18 The constitutional defect exception forecast in
19 *Luna-Diaz*, I know it's been discussed by a lot of courts, but
20 it was in a footnote. It was basically a throwaway. It didn't
21 apply in the case, and it has overwhelmingly been quoted to
22 note why it doesn't apply. It has never received serious
23 examination and, it seems to me, to have a good bit of
24 inconsistency with the holding in *Lewis*, as I have previously
25 discussed. So here we are.

1 I do acknowledge the facial appeal of
2 Mr. Moreno-Tapia's argument. It was stated in a nice shorthand
3 manner in the *Bolieiro* case that I think somebody cited to me
4 out of the District Court of Massachusetts, 923 F.Supp.2d 319,
5 and the Court there said, "Given that the 1992 deportation
6 order, Ms. Bolieira's actual removal, and this prosecution all
7 stem from a constitutionally flawed and now-vacated conviction,
8 common sense dictates the dismissal of this indictment." Maybe
9 that's so. But that is essentially a policy argument more
10 appropriate for Congress to consider or possibly it's an
11 equitable argument, but it is not a due process analysis.

12 And I would just point out that even from a policy or
13 equitable point of view, there are other facts than the fact
14 that the conviction was vacated. Mr. Moreno-Tapia didn't do
15 anything to vacate those convictions or seek reconsideration or
16 try to reopen the deportation decision. He was deported, told
17 he couldn't come back. He came back anyway. He didn't
18 register as a sex offender even though his conviction was valid
19 at the time. And he has not contended or shown that he is
20 actually innocent of the charges, and there's substantial
21 evidence of guilt.

22 And it's perfectly reasonable for Congress to say
23 that persons with facially valid convictions of certain kinds
24 of felonies should be deported and that those persons should
25 not reenter the United States without permission, and, if those

1 convictions are for sex offenses, the person should register.
2 If Congress wants to change this so that the subsequent conduct
3 is not a crime when the underlying conviction is found to be
4 constitutionally infirm, they can certainly do that just as
5 they did after the *Lewis* case about possession of a firearm by
6 a felon. Maybe they should. I just don't have -- that's just
7 not my job. That's their job.

8 So I conclude that there were no due process defects
9 in connection with the deportation process and that
10 Mr. Moreno-Tapia does not meet the statutory requirements for a
11 collateral attack. It is not a violation of due process when
12 someone who has been lawfully deported based on a facially
13 valid aggravated -- a facially valid felony conviction and who
14 has been advised that it would be illegal to come back into the
15 country is prosecuted for exactly that action.

16 So the Court will deny the defendant's motion to
17 vacate the deportation order.

18 The motion to withdraw the guilty plea was
19 conditional, so that is denied as moot.

20 To the extent the motion to dismiss the indictment is
21 still before the Court, it is denied as well.

22 Now, I hope that was reasonably clear, okay, because
23 I'm not going to do a written -- I'll just do a written order
24 that denies them for the reasons stated in court. So that
25 leaves us with sentencing, which is still a big mess.

1 MR. DUBERSTEIN: Your Honor, if I could raise one
2 issue before we move on?

3 THE COURT: Yes.

4 MR. DUBERSTEIN: I'm not sure -- the only reason I
5 want to say it is because I'm not sure I raised it before. I
6 wasn't sure it was relevant before. I think the Court made
7 reference to the fact that -- several occasions that the
8 defendant didn't raise his issue under the exhaustion
9 requirement. We're really dealing in two worlds with that
10 issue. One is the world of raising a collateral attack against
11 a criminal complaint, or criminal conviction in his case, and
12 one is reopening the immigration issue.

13 THE COURT: Right.

14 MR. DUBERSTEIN: So *Johnson* -- I can't remember the
15 exact cite of *Johnson*, but it's a Supreme Court Case.

16 THE COURT: From last week or two weeks ago, that
17 *Johnson*?

18 MR. DUBERSTEIN: No, no, not that *Johnson*, not the
19 armed career criminal *Johnson*.

20 THE COURT: Okay.

21 MR. DUBERSTEIN: This is a *Johnson* case on 2255 cases
22 and when you have the ability to file a collateral attack on a
23 prior conviction, and they've ruled -- the Supreme Court has
24 ruled that you have a reasonable amount of time from the time
25 you discover the constitutional defect to file.

1 So I think -- and his obviously wasn't a federal
2 court. It was in state court.

3 THE COURT: Right.

4 MR. DUBERSTEIN: But, again -- and obviously we
5 disagree with the Court's ruling that the constitutional
6 violation doesn't bleed over into the immigration context. But
7 I would raise the *Johnson* case as a cite in support of the fact
8 that there was no way for him to reopen -- it would be futile
9 for him to reopen his case without the knowledge of his
10 suspect's prior conviction, and he didn't know about the
11 suspect prior conviction until 2014.

12 THE COURT: Well, I don't know. Maybe that's so.
13 But he certainly knew when he was deported that the reason he
14 was being deported was his conviction for indecent liberties,
15 and what he didn't know when he pled guilty was that that
16 conviction was going to lead to his deportation. So the thing
17 that he didn't know that made his plea involuntary in 2007, he
18 did know in 2009.

19 So I appreciate your argument, and maybe you're
20 right. It almost makes it worse in some ways because that
21 means he had no reason to think it was okay to come back to
22 this country when he had a valid conviction, I mean, on
23 equitable grounds, and yet he came back anyway, which is not
24 relevant to the due process analysis.

25 MR. DUBERSTEIN: Thank you, Your Honor.

1 THE COURT: All right. I'll note that. Now,
2 speaking of *Johnson, Johnson* from just the other day.

3 MR. DUBERSTEIN: Right.

4 THE COURT: You know, I finally got these motions
5 resolved, and then I realized I still had the guidelines issues
6 to deal with, and they really seem to be not that clear to me
7 at this point. I believe, starting with the easy part -- do
8 you all have a presentence report in front of you? You might
9 want it.

10 MR. RAMASWAMY: Yes, Your Honor.

11 THE COURT: Okay. Paragraph 24, which is these
12 indecent liberties convictions we've just been talking about,
13 and in the presentence report filed back, oh, my gosh, last
14 November, he got three points to his criminal history level.
15 And I believe it's clear under 4A1.2, specifically Note 6, that
16 he should get zero points for that because that's been vacated.
17 Does everybody agree with that?

18 MR. RAMASWAMY: Yes, Your Honor.

19 MR. DUBERSTEIN: Yes, Your Honor.

20 THE COURT: Okay. So I believe that changes his --
21 in paragraph 25, his total criminal history score would become
22 two, and that would establish a criminal history score -- a
23 criminal history category of II, right? For the Government?

24 MR. RAMASWAMY: Yes, Your Honor.

25 MR. DUBERSTEIN: Yes, Your Honor.

1 THE COURT: All right. So that seems like the easy
2 part.

3 Now, if we turn back to the offense level calculation
4 beginning on paragraph 10, first, the base offense level is
5 still eight, and nothing has happened to change that. But when
6 we get to paragraph 11 -- and I will just say I have not had
7 time to really focus on the guidelines interpretations here,
8 which, you know, kind of put the due process problem aside,
9 because I don't think there's a due process problem with giving
10 him 16 or 12 or any number of points. But in terms of what the
11 guidelines say, I'm not completely sure. He should not get 16
12 levels because 2L1.2(b)(1)(A)(ii) says you only get 16 if
13 you've got points in your criminal history category
14 calculation. So you can't get 16 because that seems to me to
15 be pretty obvious. But it does say if you don't get points
16 there, you would get 12. It's plus 12. And I don't know if
17 the definition of "conviction" from Chapter 4 applies to this
18 enhancement in Chapter 2 or not. So that's question one.

19 Second, the reason for the enhancement at all only
20 applies if indecent liberties is a crime of violence. So I --
21 *Johnson* -- you know, this thought just occurred to me this
22 morning. Is the *Johnson* case from a couple weeks ago going to
23 have an effect on that? Everybody is nodding like, oh, yeah,
24 it might, I assume. I don't know if it will or not. I just --
25 that just occurred to me this morning.

1 All right. So there we are. So that's the problem
2 with 11. Is there a 12-point enhancement, or is there a
3 zero-point enhancement is how I understand the question at the
4 moment. I think there's also a question as to 17 and 18 at
5 this point in the proceedings as to acceptance of
6 responsibility. And then should it be zero for paragraph 11,
7 there would be an inadequate criminal history question.

8 I think we can do a couple of things. We can all
9 just go away one more time and think about all these guidelines
10 and try to figure them out. I am required to properly
11 calculate the guidelines, and that is a bit of a mess today.
12 On the other hand, the facts aren't really in dispute. So, you
13 know, if you all want to take a little break, consult about
14 these guidelines, I'll take my best shot at the guidelines
15 today.

16 But, you know, what really -- the guidelines are
17 helpful because they identify the important facts. In this
18 case, I know what the important facts are, so I can make an
19 appropriate sentencing decision, sort of almost regardless of
20 what the guideline calculation is because the important facts
21 are he was arrested, he did get convicted, he did get deported,
22 his conviction was vacated. These facts are all very
23 important, you know, but I'm sensitive to the fact that the
24 defendant may not have been prepared today to deal with the
25 possible decision on acceptance of responsibility and

1 inadequate criminal history. I know I had talked with the
2 probation officer about that, but I don't believe that may have
3 been in any communication with you all.

4 So the alternatives that I see are that we take a
5 recess for a month, let the Probation Office recalculate, put
6 something out there in a couple of weeks, let you all look at
7 it, object, and we'll come back. You know, that will take some
8 time, but I obviously want to do it right. I know we've all
9 been talking about, well, his guideline might just be zero to
10 six; and while that's true, one might easily think that might
11 not be enough time, so that might not be as big a problem -- I
12 haven't decided what his sentence is, but, you know, that's
13 perhaps not as big a problem as I was thinking it might be.

14 So we can do that, or we can take a short recess
15 right this second, you all can talk; I can put it on for some
16 time, you know, sooner than that without a formal
17 recalculation; or I can just sentence him today doing the best
18 I can with the guidelines and then making an appropriate
19 decision under 4553(a). So shall we take a short recess and
20 you all talk, or do you already know what you want to do
21 without talking to each other?

22 MR. DUBERSTEIN: Your Honor, I would at least like
23 time to consult with my client. I'm happy to talk to
24 Mr. Ramaswamy, too.

25 THE COURT: All right. Absolutely.

1 MR. DUBERSTEIN: I'm inclined to not have him
2 sentenced today, but I want to hear what he has to say about
3 how he wants this to proceed.

4 THE COURT: All right. My inclination is, you know,
5 to put it off and have it recalculated and have us all have
6 time to think about it and go through the steps and deal with
7 it, you know, appropriately. So that's the default. I just
8 wanted to offer, you know -- and, of course, we can do it that
9 way. Then if you all talk and you confer further with your
10 client, we can reschedule it for sooner than that. I would
11 have no real problem with that, assuming I could work you into
12 my ever-increasing court schedule. So do you want me to just
13 go ahead and schedule it, and then if you all work something
14 out, or are you agreeing we can move it up, or do you want to
15 talk to him, Mr. Duberstein?

16 MR. DUBERSTEIN: If I could, Your Honor, yes. Thank
17 you.

18 THE COURT: Let me take about a 5-minute recess or 10
19 minutes if you need longer.

20 MR. DUBERSTEIN: Five is fine.

21 THE COURT: All right. We'll take a 5-minute recess.

22 (At 12:06 p.m., break taken.)

23 (At 12:19 p.m., break concluded.)

24 THE COURT: All right. Shall we have the Probation
25 Office recalculate?

1 MR. DUBERSTEIN: Yes, Your Honor. I've discussed
2 with it Mr. Ramaswamy and my client. I think it would be
3 better if we had time to prepare. The Court's raised a number
4 of issues that I haven't even begun to research yet, including
5 the *Johnson* issue but also the acceptance of responsibility.
6 The 16-level issue I'm not sure has been settled one way or the
7 other even on the original objection to it, the one that we
8 agreed with with the Government.

9 THE COURT: Right. I think that's right. I
10 wasn't -- yeah, I didn't -- I read everything you all said
11 about the 16-level. It just didn't seem to really address the
12 language of the guidelines, you know. So that's, I think, the
13 question that I have left. I don't have a constitutional
14 problem with it.

15 So what's the best thing? Probation is quite backed
16 up with meth -- methamphetamine conspiracies and such, I know
17 from having the criminal term this month, and I don't really --
18 I really haven't thought about the career offender crime of
19 violence thing at all. *Johnson* may be just a nonissue, and it
20 may be that the whole guidelines interpretation, paragraph 11,
21 is easy, but it may not be. Do you all have a timing
22 suggestion?

23 MR. DUBERSTEIN: Your Honor, if I could, I would like
24 to ask that we be doing the whatever it is -- let's set it for
25 late August, if that's possible. Then if somehow -- I think

1 this was our agreement with the Government -- if we were able
2 to agree on something or we came to terms and we felt like
3 there wasn't anything else outstanding, and we were ready to
4 go, we could ask the Court if you had an earlier time. I'm
5 going to be out-of-pocket for the first two weeks of August
6 basically, and I don't think we'll be ready. I think that
7 would be the very bare minimum.

8 THE COURT: Oh yeah, that seems kind of -- I can do
9 it on September 3 at 9:30.

10 MR. DUBERSTEIN: Your Honor, can I look at my
11 calendar? I'm sorry. It's on my phone. I just want to make
12 sure I'm not double-booking something. Your Honor, that would
13 be fine. September 3 would be fine with us.

14 THE COURT: You all will be looking at the *Johnson*
15 issue, and maybe -- maybe that's just not an issue. I
16 certainly hope so. I'll ask the Probation Office to do a
17 recalculation. Let's see. Today is the 17th. That's
18 basically seven weeks from now. So how about if the Probation
19 Office shoots for a draft on, say, August 7. That's three
20 weeks for the Probation Office, and then you all respond within
21 one week -- no, you're going to be gone the first two weeks in
22 August.

23 MR. DUBERSTEIN: Yes, I will.

24 THE COURT: The 21st then. You all respond to her by
25 the 21st and consult with each other and such. Do that usual

1 thing required by the local rules. Then I'll ask her to send
2 me a final memo on the 27th of August, and that will give me a
3 week. So do you all want her to just recalculate the
4 guidelines, or do you want her to do -- would it be cleaner to
5 do a revised final report when she --

6 MR. DUBERSTEIN: I think, Your Honor, given the fact
7 that we've discussed the guidelines in not just one but several
8 aspects, including acceptance and all these other things as
9 well as criminal history, I think it would be better to have a
10 full report, but I don't know. An abbreviated memorandum might
11 be enough if that's -- if that includes all of those things,
12 and it's clear enough for purposes of the record.

13 THE COURT: Any preferences?

14 MR. RAMASWAMY: No preference, Your Honor.

15 THE COURT: Well, I'll just -- I mean, obviously it
16 has to include the guidelines conclusions. It has to include
17 the criminal history. It may need to include the facts of, you
18 know, the motion that was filed and the ruling on the motion.
19 Maybe it's just better to do a revised final report.
20 Obviously, lots of it won't change. So I would just ask you to
21 do a revised draft or whatever, I don't know, named something
22 like that. Then you all can object and confer. We'll do it as
23 if it was -- since I'm not telling her how to recalculate the
24 guidelines, I think I want to give you all a chance to object
25 and confer before it's finalized by the Probation Office in the

1 usual way.

2 All right. So is everybody clear on the dates?

3 Ms. Winchester, have you got those for the minute entry?

4 THE CLERK: Yes, ma'am.

5 THE COURT: All right. I'm very sorry this is taking
6 a long time, but I actually think we've moved pretty quickly
7 once it kind of got to me, and it's just a complicated matter,
8 and I do want to try to do it the right way. So there we are.
9 Anything else we need to take care of in his case today?

10 MR. DUBERSTEIN: Not today. Thank you, Your Honor.

11 THE COURT: No?

12 MR. RAMASWAMY: No.

13 THE COURT: All right. We will be adjourned.

14 (At 12:26 p.m., proceedings concluded.)

15 * * * * *

16 C E R T I F I C A T E

17 I certify that the foregoing is a correct transcript
18 from the proceedings in the above-entitled matter.

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20 Date: 11/23/2015


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